DATE: September 17, 1999

CASE NO: 1999-INA-154

In the Matter of

EL ADOBE RESTAURANT
Employer

on behalf of

ANATALIA ISABEL JIMENEZ-AMIGON
Alien

Appearances: Laura M. Friend
CEFL Legal Division
for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from El Adobe Restaurant's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able,

willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On April 6, 1996, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the California Employment Development Department ("EDD") on behalf of the Alien, Anatalia Isabel Jimenez-Amigon. (AF 50-51). The job opportunity was listed as "Specialty Cook," and the job duties were listed as follows:

> Responsible for all items prepared in a mexican [sic] kitchen of a food service establishment. Other duties include preparing and mixing corn masa for homestyle tortillas and tamales.
>
> 1. [K]nowledge of all portion sizes, quality standards, food temperatures for fish, pork, poultry and beef to prevent illness to customers, all restaurant rules and procedures.
> 2. Identifies portions and prepares fish, poultry, beef, pork, chilies, beans and rice used for frying, steaming, sauteing, boiling and grilling.
> 3. Prepares items for frying, sauteing, steaming, battering and boiling by portioning and mixing herbs and spices for correctly seasoning food items.
> 4. Prepares salsas, guacamoles, marinades and sauces by portioning and mixing the correct combinations of herbs, spices and chilies. Sautes items and prepares mexican [sic] sauces as appropriate.
> 5. Plates fried, sauted,[sic] steamed and boiled items along with garnish.
> 6. Keeps and maintains a sanitary work station.
> 7. Uses knives, handtools, utensils, and equipment to portion, cut, slice, dip, chop and mix. Maintain holding temperature, fry, steam, boil, saute or otherwise produce food in the fry, saute, steam and boil cooking stations.

(AF 50). The stated job requirements for the position, as set forth on the application, are six years of grade school and two years experience in the job offered. Other special requirements were listed as:

> KNOWLEDGE OF REGIONAL MEXICAN SPICES & HERBS USED IN RECIPIES [sic]. ABILITY TO PREPARE AND COOK FOOD IN A CATERING

ENVIRONMENT. KNOWLEDGE OF FOOD PORTIONS AND THEIR RELATION TO FOOD PRODUCTION COSTS WITHIN ESTABLISHED RECIPIES [sic]. ABLE TO WORK IN A FAST ENVIRONMENT.

(Id.). The rate of pay was listed as $5.50 per hour with no overtime. (Id.).

On April 19, 1996, the EDD notified the Employer that the prevailing wage for a Specialty Cook was $11.29 per hour. (AF 97). This rate was based on the McNamara-O'Hara Service Contract Act wage determination for Cook II. (Id.). On September 20, 1996, the Employer responded to the EDD assessment notice and asserted that it chose not to amend the wage offering and submitted the results from a survey of eight employers in the area. (AF 52-95). The surveys provided the name and address of the restaurant and the wage paid per hour which ranged from $4.50 to $8.00 per hour. (AF 56-71).

The application was forwarded to the CO on November 4, 1996. (AF 49). On July 22, 1997, the CO issued a Notice of Findings ("NOF") proposing to deny the application for failure to offer the prevailing wage. (AF 46-48). The CO found that the occupation was one for which a prevailing wage determination had been made under the Davis-Bacon Act. The CO required the Employer to amend its wage offer to $11.29 per hour and document its willingness to retest the labor market. (AF 47).

Employer submitted its rebuttal on August 21, 1997. (AF 32-45). Counsel for Employer declined pay the prevailing wage and requested that the case be remanded to the EDD for a reclassification of the prevailing wage for Cook, Mexican Food Specialty Occupation. (AF 32). Employer's counsel explained that "the circumstances are different for a Mexican Food Establishment than say for a French, Japanese or Morrocan [sic] Food Restaurant. In our local area there is much more competition and the Mexican Food profit margins are extremely low. Employers are unable to pay this prevailing wage and stay in business in our area." (Id.). The Employer also submitted wage surveys of 6 Mexican restaurants. (AF 40-45).

On December 3, 1997, the CO issued a Supplemental Notice of Findings ("SNOF") in order to afford the Employer an opportunity to address issues or correct deficiencies which arose as a result of its rebuttal to the initial NOF. (AF 29-31). First, the CO noted that the original NOF was in error as the Davis-Bacon Act does not apply to foreign food specialty cooks. Second, the CO asserted that the burden of proof is on the Employer to show that salaries paid to Mexican specialty cooks differ from cooks who prepare different types of foreign specialty foods, and the CO denied the Employer's request to be remanded to the EDD. The CO found that the wage offer of $5.50 per hour was below the prevailing wage of $11.29 per hour which was determined by the local Employment Service office. (AF 29). The CO instructed the Employer to either increase the rate of pay to at least within 5% of $11.29 per hour and retest the labor market, or show that the wage offer is within 5% of or exceeds the prevailing wage for the occupation. In order to show that the Employer's wage offer is the prevailing wage, the Employer was instructed to forward a survey of "six or seven Mexican restaurants in the labor market that are both larger and smaller in scope and operation." (AF 30).

The Employer submitted a rebuttal to the SNOF on December 29, 1997. (AF 17-27). The Employer again chose not to raise the wage offer to $11.29 per hour, and argued that: "We are willing to pay the prevailing wage but the prevailing wage in our area in which we do business and in which we have physically conducted surveys to show that the prevailing wage for this cook position is between $7.00 and $8.00 dollars per hour." (AF 17). The Employer further argued that the Employment Service Office prevailing wage information is "incorrect and out dated." (Id.). The Employer conducted a survey of six Mexican restaurants and found the prevailing wage being paid to range from $5.75 to $8.00 per hour. (AF 18). These survey results were submitted with the rebuttal. (AF 22-27).

On June 4, 1998, the CO issued a Final Determination ("FD") denying certification. (AF 14-16). The CO found that the Employer had failed to either amend its wage offer to meet the prevailing wage rate or to produce evidence showing that the prevailing wage determination was in error. The CO found that:

> The employer provided wage rebuttal that is best expressed in the following array:
> Wage breakout showing range per employers surveyed:
>
> | | |
> |---|---|
> | $7.00 | $9.00 |
> | 5.75 | 7.00 |
> | 7.00 | 8.00 |
> | 6.00 | 8.00 |
> | 7.00 | 8.50 |
> | 7.25 | 8.00 |
> | 40.00 | 48.00 (total) |
> | 6.66 | 8.08 (average) |

(AF 15). The CO concluded that the Employer's wage survey was not significant since the Employer's wage offer of $5.50 per hour is still below the lowest portion of the range. (AF 16).

On June 22, 1998, the Employer filed a Request for Review of a Denial of Certification. (AF 1-13). The Employer argued that based on the wage survey of seven employers, the weighted average of pay for a cook with comparable duties amounted to $6.50 per hour for the low weighted average and $7.86 per hour for the high weighted average. The Employer asserted that its wage offer is now "$7.47 per hour which is within the 5 percent differentiation. The fact that the seven above named competitors pay their cooks within the prevailing wage as determined by this survey, our wage offer is extremely competitive given the size of our company." (AF 2). The Employer argued that "our wage survey for individuals employed in the substantially comparable job (i.e. cook II or specialty cook), with an offer of $7.47 per hour is not only reasonable but well within the prevailing wage." (Id.). The Employer submitted a Brief in Support of Appeal on April 3, 1999.

Discussion

Under section 656.20(c)(2), an employer is required to offer a wage that either equals or exceeds the prevailing wage determined under 656.40. Where an employer is notified that its wage offer is below the prevailing wage, but fails either to raise the wage to the prevailing wage or to justify the lower wage, certification is properly denied. *General Aerospace Corp.*, 88-INA-480 (Jan. 11, 1990). *See also Emil Sztykiel*, 88-INA-67 (Mar. 1, 1989); *Ashwin L. Shaw*, 88-INA-290 (Nov. 2, 1989). The employer bears the burden of establishing both that the CO's determination is in error, and that the employer's wage offer is at or above the prevailing wage. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989).

In the present case, the Job Service and the CO found that the local prevailing wage rate for the job offered is $11.29 per hour. (AF 29). This wage rate was determined by the local Employment Service Office, to the extent of its expertise, and to the extent feasible, using the wage information available to it. (Id.). The CO noted that this wage rate is for the job classification of Specialty Cook, and that there was not a separate Dictionary of Occupational Title code or listing for Mexican Specialty Cooks. The Employer's offered rate of pay of $5.50 per hour is not within 5% of the prevailing wage set forth by the CO.

The Employer was instructed in the SNOF of the two possible ways to cure the wage deficiency and elected to rebut the SNOF by challenging the validity of the Job Service's wage survey and conducting its own survey. The Employer surveyed 6 Mexican restaurants which provided a low range and high range of each employer's pay scale. The results of the survey established a low average of $6.66 per hour and a high average of $8.08 per hour. In addition, the lowest wage rate for an employer in this survey was $5.75 per hour.

Upon review, even if we assume that the Employer's wage survey is relevant and accurate, it does not support the conclusion that the Employer has offered the prevailing wage rate. The Employer's wage rate of $5.50 is below any of the wages offered in the Employer's survey and is not within five percent of the low average wage of $6.66 as required by section 656.40(2)(i). Moreover, the Employer never offered to raise its proposed salary to the average wage disclosed by its own surveys. Therefore, even if we assume that the Employer has established that the CO's survey is incorrect and that its own survey is correct, the Employer has failed to meet its burden of establishing that its wage offer is at or above the prevailing wage. *See PPX Enterprises, Inc.*, supra; *Nastrix Corp.*, 90-INA-429 (Nov. 27, 1991).

Finally, we note that in its Request for Review and brief in support thereof, the Employer sought to increase its wage offer to $7.47 per hour which would be within five percent of the high average wage listed in the Employer's survey.[1] (AF 2) The Board's review of a denial of labor

[1] The survey results discussed in the Employer's Request for Review included one additional restaurant that was not included in the Employer's rebuttal but was submitted to the EDD in response to the assessment notice. We note that even with this addition, the low average wage was $6.50 per hour which is not within five percent of the Employer's original offer. (AF 2).

certification is based on the record upon which the denial was made. 20 C.F.R. 656.26(b)(4) and 656.27(c). Evidence submitted after the Final Determination cannot be considered by the Board on appeal. *University of Texas at San Antonio*, 88-INA-71 (May 9, 1988).

In view of the foregoing, we find that the application for labor certification was properly denied.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California